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Right to Counsel

measure of attorney performance remains simply reasonableness under prevailing professional norms . . . whether counsel's assistance was reasonable considering all the circumstances."[199] The Court, however, did go on to clarify that this standard was merely a guide, in that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by the defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[200]

Although New York has not adopted the "reasonable competence" standard articulated in *Strickland,* the courts do require a similar standard. Taking each case into consideration for its uniqueness, the New York courts look at the totality of circumstances to determine whether counsel provided "meaningful representation."[201]

SECOND DEPARTMENT

People v. DeFreitas[202]
(decided Aug. 14, 1995)

Defendant claimed ineffective assistance of trial counsel, arguing that his attorney failed to request a charge of a lesser-included offense, failed to request that a *Huntley* hearing be reopened and failed to assert that defendant had been "framed."[203] The defendant asserted that the inaction of his attorney amounted to a denial of his rights under the Federal[204]

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199. *Id.*

200. *Id.* at 688-89 (holding that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

201. People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981).

202. 213 A.D.2d 96, 630 N.Y.S.2d 755 (2d Dep't 1995).

203. *Id.*

204. U.S. CONST. amend. IV. This provision states in pertinent part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence." *Id.*; *see* Reece v. Georgia, 350 U.S. 85, 90 (1955) (holding that

and State[205] Constitutions.[206] On appeal, the Appellate Division, Second Department affirmed the lower court's decision and held that defendant had been provided meaningful representation.[207]

The defendant had been arrested following a police chase which began after he was interrupted, during the armed robbery of a jewelry store, by two uniformed police officers who appeared in response to the store's silent alarm.[208] The defendant attempted to shoot one of the officers at point blank range when they arrived.[209] The defendant's gun, however, failed to discharge.[210] Taking the store owner and an employee as hostages and using them as a shield, the defendant commandeered an automobile and sped away.[211] In his attempt to escape, defendant crashed into a stopped car, then fled on foot.[212] One of the officers caught the defendant, who surrendered after dropping a gun clip.[213] The gun was discovered in the car.[214]

The court noted that "[f]rom the moment he spotted the defendant, until he arrested him, the police officer never lost sight of the defendant."[215] Furthermore, the jewelry store's business card was found in the defendant's possession, and diamonds were found in the defendant's pants pocket.[216] In addition, the victims from the store identified the defendant immediately.[217] Moreover, the crime scene unit found an "unfired live round that displayed a light hit, i.e., a slight

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the right to assistance of counsel under the Sixth Amendment includes effective assistance of counsel).

205. N.Y. CONST. art. I, § 6. This provision states in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel . . . ." *Id.*

206. *DeFreitas*, 213 A.D.2d at 98, 630 N.Y.S.2d at 757.

207. *Id.* at 97-102, 630 N.Y.S.2d at 757-60.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

depression on its primer, which, according to firearms testimony, indicated that it had been in a weapon that had its trigger pulled but did not fire that bullet."[218]

The defendant's claim that he was denied effective assistance of counsel when his trial attorney had failed "to request a charge of attempted assault in the second degree as a lesser-included offense of attempted murder in the first degree," was quickly dismissed.[219] In the lower court, it was established that from a close distance, defendant had pointed a pistol directly at the police officer's chest and pulled the trigger.[220] Therefore, the court determined that "the failure of the defense counsel to ask for the lesser-included charge [did] not amount to an absence of meaningful representation," because it was clear from the evidence that the lesser charge would not have been supportable.[221]

Without elaboration, the appellate division also found that there had been no ineffective assistance of counsel in defendant's attorney's decision to forego a *Huntley* hearing[222] regarding the voluntariness of a statement made by the defendant which concerned his age.[223] The lower court determined that the defendant's statement was made voluntarily and, therefore, was admissible.[224]

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218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* (citing People v. Burke, 73 A.D.2d 627, 628, 422 N.Y.S.2d 469, 470-71 (2d Dep't 1979) (holding that a defendant who had fired his gun from short range at police during a chase had, by that conduct, shown his intent to bring about death rather than serious injury and, therefore, the lower court properly refused the request for an instruction on a lesser-included offense)).

222. People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) (holding that in criminal trials, a judge must hold a preliminary hearing and determine beyond a reasonable doubt that a confession made by a defendant was voluntary, in order for the confession to be revealed to the jury at trial).

223. *Defreitas*, 213 A.D.2d at 98, 630 N.Y.S.2d at 757.

224. *Id.*

As for defendant's claim that his counsel "never asserted that the wrong man was arrested,"[225] the court found that the advancement of such a hypothesis would have been implausible and prejudicial to the defendant because "the proof of the defendant's involvement was overwhelming."[226] Explaining the issue of ineffective assistance of counsel under the Sixth Amendment, the United States Supreme Court cited *Strickland v. Washington*.[227] *Strickland* provides the federal test to be used by courts when determining whether counsel rendered "reasonably effective assistance."[228] *Strickland* sets forth a two-prong test used to determine whether a counsel's errors violated an individual's constitutional right to effective counsel.[229]

To satisfy the first prong, the defendant must show that his counsel's representation failed to provide him with reasonably effective assistance.[230] Moreover, the counsel's errors must be so serious as to lead the court to conclude that defendant's representation was not functionally equivalent to that which is guaranteed under the Sixth Amendment.[231] The second prong of the *Strickland* test is satisfied when the defendant shows that he was prejudiced in that there was a "reasonable probability that, but for counsel's unprofessional errors the results of the proceeding would have been different."[232] The *Strickland* court explained that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."[233] The *Strickland* Court emphasized that a defendant's claim of ineffective assistance of counsel would fail if either of the two prongs were not shown by the defendant.[234]

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225. *Id.*
226. *Id.* at 100, 630 N.Y.S.2d at 758.
227. 466 U.S. 668 (1984).
228. *Id.* at 687.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 694.
233. *Id.*
234. *Id.* at 687.

The New York test for determining ineffective assistance of counsel is found in *People v. Baldi*.[235] In *Baldi*, the New York Court of Appeals set forth the test stating that "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided *meaningful representation*, the constitutional requirement will have been met."[236]

Applying this test to the case at bar, the *DeFreitas* court noted that the New York test of "requiring meaningful representation -- [is] a more searching inquiry than the farce and mockery [of justice] standard," which had previously been the standard used by New York courts to indicate a constitutional deprivation based on counsel's performance.[237] Further, the *DeFreitas* court stated when "weighing constitutional claims of ineffective assistance of counsel in criminal cases, the courts have considered and have invoked ethical standards recognizing . . . [not only] the interests of the defendants, but the credibility of the system, its integrity and the institutional interests in . . . just verdicts."[238]

In addition, the court quoted the following from the American Bar Association ethical standards:

> It is fundamental that defense counsel must be scrupulously candid and truthful in representations in any matter before a court. This is not only a basic ethical requirement but it is essential if the lawyer is to be effective in the role of advocate, for if the lawyer's reputation for veracity is suspect, he or she

235. 54 N.Y.2d 137, 146-47, 429 N.E.2d 400, 403-04, 444 N.Y.S.2d 893, 897-98 (1981).

236. *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898 (emphasis added).

237. *DeFreitas*, 213 A.D.2d at 98-99, 630 N.Y.S.2d at 758.

238. *Id.* at 100, 630 N.Y.S.2d at 759 (citing Wheat v. United States, 486 U.S. 153, 160 (1988) (affirming a district court decision where the court had declined a criminal defendant's proposed substitution of counsel in regard to joint representation and noting that the lower court had not abused its discretion in a case which had required complex litigation and where it had been necessary to regulate multiple representation despite a possible conflict of interest resulting from joint representation)).

> will lack the confidence of the court when it is needed most to serve the client.[239]

With regard to defendant's claim that his counsel had failed to assert that defendant was the "wrong man" (i.e., that he had been "framed"), the *DeFreitas* court stated that "counsel may be reasonably expected to call upon witnesses to testify on behalf of a defendant *only when such witnesses exist.*"[240]

Furthermore, the court explained that "it has been made clear that the defense counsel's obligation to pursue a particular contention or avenue of defense contemplates that the claim be colorable."[241] Moreover, "there is no constitutional or statutory right of a defendant to an attorney who will initiate a fabricated defense."[242] Simply put, the "Sixth Amendment does not require that counsel do what is unethical or impossible,"[243] and counsel need not create nonexistent defenses that will ultimately "disserve the interests of his client by attempting a useless charade."[244]

Moreover, the *DeFreitas* court observed that the basis for defendant's claim of ineffective assistance of counsel, which was,

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239. *Id.* at 100, 630 N.Y.S.2d at 758 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, 124 (3d ed. 1993)). The court also cited ABA Model Code of Professional Responsibility, DR 7-106(C)(1), and other ethical requirements which require that an attorney not knowingly make false statements or statements for which there is no reasonable basis. *Id.* at 100, 630 N.Y.S.2d at 758-59.

240. *Id.* at 100-01, 630 N.Y.S.2d at 759 (citing People v. Aiken, 45 N.Y.2d 394, 399, 380 N.E.2d 272, 275, 408 N.Y.S.2d 444, 448 (1978) (stating that "the wisdom of counsel's decision can provide no basis for appellant's claim that he was denied effective counsel")).

241. *Id.* at 101, 630 N.Y.S.2d at 759 (citing People v. Garcia, 75 N.Y.2d 973, 555 N.E.2d 902, 556 N.Y.S.2d 505 (1978) (holding that defendant's trial attorney "offered sound reasons for not challenging [defendant's] arrest" and thus defendant's claim of ineffective assistance of counsel failed)).

242. *Id.* at 101, 630 N.Y.S.2d at 759.

243. *Id.* (citing United States v. Cronic, 466 U.S. 648, 656-57 (1984) (holding that even where counsel has made demonstrable errors, a defendant's right to effective assistance of counsel under the Sixth Amendment has been satisfied where there has been a "meaningful adversarial" confrontation between the defense and prosecution)).

244. *DeFreitas*, 213 A.D.2d at 101, 630 N.Y.S.2d at 759 (citing *Cronic*, 466 U.S. at 657).

inter alia, that his counsel had failed to claim that defendant had been "framed," was an unbelievable theory and could have worked against his defense.[245] According to the court, counsel was not required to "cast aside the intelligence of the jury, and in the name of advocacy, and despite its incompatibility with established ethical standards, advance or fabricate any theory, however false or specious it may be."[246]

In this case, the comparison of the federal and state rationales for determining ineffective assistance of counsel indicates that any differences between the two is transparent.[247] As the court of appeals has stated:

> To be sure, we have developed a somewhat different test for ineffective assistance of counsel under art. I, sec. 6 of the New York Constitution from that employed by the Supreme Court in applying the Sixth Amendment . . . . Nonetheless, the basic purposes and constitutional interests at stake under both constitutional guarantees of an adequate legal defense in a criminal case are the same: the preservation of our unique adversarial system of criminal justice, the underlying presupposition of which "is that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[248]

Finally, there is no practical difference between the Federal and New York State Constitutions involving claims of ineffective assistance of counsel that are premised on counsel's failure to assert implausible arguments. As stated by the Appellate Division, Second Department, counsel is certainly not required to set forth "baseless, spurious, or unethical" assertions or defenses to fulfill the standard of meaningful representation.[249]

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245. *Id.* at 100, 639 N.Y.S.2d at 758.

246. *Id.* at 100, 630 N.Y.S.2d at 758-59.

247. *Id.* at 99, 630 N.Y.S.2d at 758 (citing People v. Claudio, 83 N.Y.2d 76, 80, 629 N.E.2d 384, 386, 607 N.Y.S.2d 912, 914 (1993) (comparing federal and state precedent and stating that the right to effective assistance of counsel does not begin until "adversarial" proceedings have commenced)).

248. *Claudio*, 83 N.Y.2d at 79, 629 N.E.2d at 385-86, 607 N.Y.S.2d at 914 (citation omitted).

249. *DeFreitas*, 213 A.D.2d at 97, 630 N.Y.S.2d at 757.